STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of KELLYN DANTE WALKER II and ALVIN CHARLES WALKER, JR., Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ALVIN CHARLES WALKER,

Respondent-Appellant,

and

DOROTHY MARIA BAILEY,

Respondent.

UNPUBLISHED
August 25, 2005

No. 260466
Wayne Circuit Court
Family Division
LC No. 03-426052-NA

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Respondent-appellant appeals as of right from the trial court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(c)(i), (g), and (h). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The trial court did not clearly err in determining that the statutory grounds for termination were established by clear and convincing evidence. MCR 3.977(J); *In re Trejo*, 462 Mich 341, 353-354; 612 NW2d 407 (2000); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999). Respondent-appellant was convicted of assaulting the children's mother while she was pregnant with the younger child. He was sentenced to four prison terms with an earliest possible release date in 2008. While he was incarcerated, respondent-appellant's children were removed from their mother's care on the basis of neglect. No treatment plan was offered to respondent-appellant because his lengthy incarceration prevented him from making a permanent plan for the children. However, respondent-appellant's relatives were investigated as possible placements for the children and, by the time that the supplemental termination petition was filed, respondent-appellant's niece was providing foster care for the older child (but not the younger child, who suffered from serious medical problems).

The adjudicating condition, with regard to respondent-appellant, was his incarceration, and this condition had not been rectified pursuant to subsection 19b(3)(c)(i) and there was no reasonable likelihood that it would be rectified within a reasonable time considering the children's young ages. Respondent asserts that the FIA should have been put on notice to investigate further by respondent's statements regarding Bailey's failure to testify at his criminal trial and admissions that she had lied. Respondent argues that his appeal is pending, a decision is imminent, and that his chances of success are good. Indeed, the Supreme Court has granted leave in respondent's criminal case to consider whether his conviction should be vacated and respondent granted a new trial.

Nonetheless, respondent offers no case law or other authority to support the proposition that FIA must independently assess the merits of criminal convictions pending appellate review. The FIA is ill-suited to perform such reviews. In *In re Kemp*, unpublished memorandum opinion of the Court of Appeals, issued June 8, 2004 (Docket No. 251249), a panel of this Court correctly observed that the trial court could not become arbiters of criminal law and had no obligation to consider the strength of a respondent parent's appeal from criminal convictions. Although *In re Kemp* has no precedential value, the same reasoning applies to the FIA in this case and results in the conclusion that the FIA did not commit error requiring reversal when it did not investigate the merits of respondent's appeal.

Moreover, with respect to subsection 19b(3)(g), it was clear that respondent-appellant had not provided proper care and custody for the children since the start of these protective proceedings, irrespective of the care that he may have provided before his incarceration, and there was no reasonable expectation that he would be able to do so in the near future. Termination of respondent-appellant's parental rights was also appropriate under subsection 19b(3)(h) because it was the FIA and not respondent-appellant who arranged the older child's placement with respondent-appellant's niece. In addition, respondent-appellant never provided for the care of the younger child and there was no reasonable expectation that he would be able to do so within a reasonable time considering the younger child's age.

Respondent-appellant next argues that he met his burden of going forward with best interests evidence, which is a misinterpretation of the current law set forth in *In re Trejo, supra* at 364, which instructed courts to review the whole record when reviewing the best interests of a child. In this case, a review of the whole record shows that the trial court did not clearly err when it determined that the children's need for a permanent home outweighed the bond that respondent-appellant and the older child may have shared.

Next, the FIA did not commit reversible error when it failed to prepare a treatment plan for respondent-appellant. In general, when a child is removed from the custody of the parents, the agency is required to make reasonable efforts to rectify the conditions that caused the child's removal by adopting a service plan. MCL 712A.18f(1), (2) and (4). However, services are not required in all situations, *In re Terry*, 240 Mich App 14, 26 n 4; 610 NW2d 563 (2000), although the FIA is required to justify its decision not to provide services to a particular family. MCL 712A. 18f(1)(b). Lastly, a case service plan need not be directed at reunification. MCL 712A.18f(3)(d). In this case, the FIA's plan for respondent-appellant was to terminate his parental rights since his lengthy prison sentences would cause him to be incarcerated until at least 2008. In her testimony, the foster care worker justified this decision by referring to the FIA's permanency planning policy, which was based upon the Binsfield legislation. As such, the

FIA did not commit reversible error when it did not prepare a treatment plan for respondent-appellant or offer services to him.

Finally, the FIA was not obligated to consider the merits of respondent-appellant's criminal appeal, nor would it have been appropriate for the FIA to do so.

Affirmed.

/s/ Brian K. Zahra
/s/ Hilda R. Gage
/s/ Christopher M. Murray